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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 890.

J. B. KING,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

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J. B. KING,
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STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

OPINION BELOW.

The opinion of the Court of Criminal Appeals of Tennessee was entered and filed on September 4, 1968, and has been published at 432 S. W. 2d 490. The Supreme Court of Tennessee denied certiorari on October 7, 1968, in an Order which can be found on page A-8 of the Appendix of the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition. However, the respondent directs attention to the fact that the Petition seeks a writ of certiorari

directed to the Supreme Court of Tennessee while this cause remains in the Court of Criminal Appeals of Tennessee, as the Supreme Court of Tennessee refused to issue a writ of certiorari to the Court of Criminal Appeals of Tennessee. Therefore, the respondent respectfully submits that the Petition seeks the writ of certiorari directed to the improper Court.

QUESTION PRESENTED.

The respondent is dissatisfied with the presentation of the question by the Petition and, pursuant to **Rule 40 (3)** of the Supreme Court Rules, presents the question as follows:

> Did the Petitioner, by consenting to and obtaining continuances of his case after the indictment had been returned, waive his right to a speedy trial by failing to promptly assert this personal right?

STATUTE INVOLVED.

Section 40-2102 of **Tennessee Code Annotated** provides:

> "If a defendant charged with an offense be not indicted at the term to which he has been bound, or, where the trial has not been postponed on his application, be not brought to trial at the next regular term of the court in which the indictment is triable, after the same is found, the court may order it to be dismissed, unless good cause to the contrary be shown."

STATEMENT OF THE CASE.

The Petitioner was convicted by a jury in the Criminal Court of Knox County, Tennessee, of the crime of assault with intent to commit murder in the second degree. The Petitioner was sentenced to serve a term of not less than one (1) year, nor more than five (5) years, in the State Penitentiary. The Petitioner was represented by privately retained counsel at his original trial, and has been out on bond since his arrest.

The evidence establishing the Petitioner's guilt is adequately set forth in the opinion of the Criminal Court of Appeals of Tennessee and counsel for the respondent respectfully submits that any further summary of this evidence would be needless repetition. However, the opinion of the Court of Criminal Appeals of Tennessee and the Petition filed herein fail to mention several matters shown by the record which are crucial to a proper consideration of the question before this Court.

Initially, it must be noted that the Petitioner's motion to the Trial Court, which was never formally presented in writing and was made orally on the day of the trial, only mentioned the absence of some unnamed witnesses as being the prejudice resulting from the delay in this case. However, it must also be noted that the Petitioner, in his statement of the motion to the Trial Court, admitted that these unnamed witnesses had been available a year ago. In addition, the Petitioner has never shown any evidence of any attempt at any time to secure the attendance of these unnamed witnesses.

The Petitioner was arrested for this crime on November 14, 1964. He was charged with assault with intent to commit murder in the first degree in an indictment returned by the Knox County Grand Jury on March 25, 1966. After at least three continuances, the Petitioner's

trial was held on March 20 and 21, 1967. The record reflects that the Petitioner requested the first continuance after the indictment had been returned, which was about a year before the trial, and failed to interpose any objection to subsequent continuances granted in this case. The record also reflects that some of the delay in this case was caused by the fact that the person assaulted by the Petitioner had to be hospitalized several times as a result of the assault which made it impossible for him to appear before the Knox County Grand Jury and accounted for one of the continuances after the indictment had been returned.

ARGUMENT.

There can be little doubt that the accused's right to a speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States is made obligatory on the several states by the Fourteenth Amendment. **Klopfer v. North Carolina,** 386 U. S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988. This Court's views on the Sixth Amendment guarantee of a speedy trial are most succinctly summarized in the following excerpt from **United States v. Ewell,** 383 U. S. 116, 120, 15 L. Ed. 2d 627, 630, 86 S. Ct. 773, 776:

> "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. However, in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. Therefore, this Court has consistently been of the view that 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.' Beavers v. Haubert, 198 U. S. 77, 87, 49 L. Ed. 950, 954, 25 S. Ct. 573, 576. 'Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances. . . . The delay must not be purposeful or oppressive,' Pollard v. United States, 352 U. S. 354, 361, 1 L. Ed. 2d 393, 399, 77 S. Ct. 481, 486. '(T)he essential ingredient is

orderly expedition and not mere speed.' Smith v. United States, 360 U. S. 1, 10, 3 L. Ed. 2d 1041, 1048, 79 S. Ct. 991, 997."

As in Tennessee, **Raine v. State,** 143 Tenn. 168, 226 S. W. 189, and **Wright v. State,** 218 Tenn. 610, 405 S. W. 2d 177, the Federal decisions clearly establish that the right to a speedy trial is the defendant's personal right and is deemed waived if not promptly asserted. **United States v. Lustman,** 258 F. 2d 475, 478 (2d Cir. 1958), **cert. denied** 358 U. S. 880, 3 L. Ed. 2d 109, 79 S. Ct. 118; **United States v. Aadal,** 368 F. 2d 962 (2d Cir. 1966), **cert. denied** 386 U. S. 970, 18 L. Ed. 2d 130, 87 S. Ct. 1161; **United States v. Van Allen,** 288 F. 2d 825 (2d Cir. 1961), cert. denied 368 U. S. 836, 7 L. Ed. 2d 37, 82 S. Ct. 31; **Danziger v. United States,** 161 F. 2d 299 (9th Cir. 1947), **cert. denied** 332 U. S. 769, 92 L. Ed. 354, 68 S. Ct. 81; **Campodonico v. United States,** 222 F. 2d 310 (9th Cir. 1955), **cert. denied** 350 U. S. 831, 100 L. Ed. 2d 742, 76 S. Ct. 65. Also, as in Tennessee, the Federal decisions clearly establish that where some or all of the delays were at the defendant's request or by his own action, the defendant will be precluded from invoking his constitutional right to a speedy trial. **Osborne v. United States,** 371 F. 2d 913 (9th Cir. 1967), **cert. denied** 387 U. S. 946, 18 L. Ed. 2d 1335, 87 S. Ct. 2082; **United States ex rel. Hanson v. Ragen,** 166 F. 2d 608 (7th Cir. 1948), **cert. denied** 334 U. S. 849, 92 L. Ed. 1772, 68 S. Ct. 1501; **United States v. Fassoulis,** 293 F. 2d 243 (2d Cir. 1961), **cert. denied** 368 U. S. 919, 7 L. Ed. 2d 134, 82 S. Ct. 240.

These Federal and Tennessee decisions clearly establish that the right to a speedy trial is indeed not designed as a sword to effect the defendant's escape, but rather to serve as a shield for the accused's protection. Note, **The Right to a Speedy Criminal Trial,** 57 Col. L. Rev. 846, 853 (1957). In the case herein under consideration, the

Petitioner is attempting to carve out his freedom, after havinge acquiesced in the delay of his trial for almost one year, on the basis of an oral motion on the day of trial suggesting the absence of some unnamed witnesses whom he had not seen fit to subpoena.

CONCLUSION.

As the Petition presents no question which merits this Court's review upon a writ of certiorari, the respondent respectfully submits that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee,

.....

LANCE D. EVANS,
Assistant Attorney General,
State of Tennessee,
Attorneys for Respondent.

Certificate of Service.

I, Thomas E. Fox, Deputy Attorney General of the State of Tennessee, one of the attorneys for the respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of January, 1969, I served a copy of the within Brief in Opposition to the Petition for Writ of Certiorari on J. B. King, Petitioner, by mailing said copy in a duly ad-

dressed envelope, postage duly paid, to counsel of record, William E. Badgett, Esquire, Attorney at Law, 608 Bank of Knoxville Building, Knoxville, Tennessee 37902.

.....

Thomas E. Fox,
Deputy Attorney General,
State of Tennessee.